



February 19, 2002

Ms. Ashley D. Fourt  
Assistant County Attorney  
Tarrant County  
401 West Belknap  
Fort Worth, Texas 76196-0201

OR2002-0802

Dear Ms. Fourt:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 158735.

The Tarrant County District Attorney (the "district attorney") received a request for files maintained by the district attorney in the case of *State v. Frank McFarland*. You claim that some of the requested information is excepted from disclosure under sections 552.101, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information, some of which is a representative sample.<sup>1</sup>

Initially, we note that the submitted information contains documents that are subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

- (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

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<sup>1</sup>We assume that the "sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

....

(1) (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The requested documents relate to a completed investigation. Therefore, with the exception of documents made confidential by other law or excepted under section 552.108, these documents must be released. While you claim that some of these records are excepted from disclosure pursuant to section 552.111 of the Government Code, section 552.111 is a discretionary exception under the Act and, as such, does not constitute "other law" for purposes of section 552.022(a)(17).<sup>2</sup> Consequently, we do not address your section 552.111 claim with regard to these records, and they must be released.

You claim that some of the requested information is excepted under section 552.108. Section 552.108(a)(2) of the Government Code provides that information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from required public disclosure if:

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication

Gov't Code § 552.108(a)(2). You advise that the requested information contains documents relating to two other homicides, namely, of Dennis Youngblood and Michael Wilson, which were investigated but never prosecuted. Thus, the investigations of these homicides have concluded and did not result in conviction or deferred adjudication. Therefore, the district attorney may withhold most of this information. However, section 552.108 is inapplicable to basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Company v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). In addition, the information pertaining to the Youngblood homicide includes an autopsy report. An autopsy report is public under section 11 of article 49.25 of the Code of Criminal Procedure. Thus, with the exception of the basic front page offense information and the autopsy report, the district attorney may withhold the information related to the investigations

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<sup>2</sup> Discretionary exceptions are intended to protect only the interests of the governmental body as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. See, e.g., Open Records Decision No. 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

of the Youngblood and Wilson homicides from disclosure based on section 552.108(a)(2). As section 552.108 is dispositive in relation to the information regarding these investigations, we do not address your other claimed exceptions for this information.

You further argue that the remaining requested information includes grand jury information that is excepted from required public disclosure. Article 20.02 of the Code of Criminal Procedure provides for the secrecy of grand jury proceedings. This office has concluded that grand juries are not governmental bodies that are subject to chapter 552 of the Government Code, so that records that are within the actual or constructive possession of a grand jury are not subject to disclosure under chapter 552. *See* Open Records Decision No. 513 (1988). When an individual or entity acts at the direction of the grand jury as its agent, information prepared or collected by the agent is within the grand jury's constructive possession and is not subject to chapter 552. *Id.* at 3. Information that is not so held or maintained is subject to chapter 552 and may be withheld from disclosure only if a specific exception to disclosure is applicable. *Id.* You represent that some of the requested documents were prepared and collected at the direction of the grand jury. Based on your representations, we conclude that these records were obtained by your office pursuant to a grand jury subpoena or at the direction of the grand jury. Therefore, the documents labeled as grand jury information are in the custody of your office as agent of the grand jury and are not subject to disclosure under chapter 552. *Id.* at 4.

You also contend that the submitted information contains compilations of criminal history information that must be withheld under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," which includes information made confidential by other statutes. Criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990); *see* 28 C.F.R. § 20.21(c)(2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself"). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083.

Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided

by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See Open Records Decision No. 565 (1990)*. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Accordingly, we have marked the information that must be withheld under chapter 411 and section 552.101 of the Government Code.

There is additional criminal history information that must also be withheld under the right of common law privacy. Under *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), where an individual's criminal history information has been compiled or summarized by a governmental entity, the information takes on a character that implicates the individual's right of privacy in a manner that the same individual records in an uncompiled state do not. We have marked the criminal history information compiled by a law enforcement agency that also must be withheld under section 552.101. However, because the privacy rights of an individual lapse upon death, we conclude that the district attorney may not withhold any of the criminal history information that was compiled by a law enforcement agency that relates to any individual now deceased.

Furthermore, you claim that autopsy photographs must be withheld under section 552.101. Autopsy photographs are subject to disclosure under law other than chapter 552 of the Government Code.<sup>3</sup> Section 11 of article 49.25 of the Code of Criminal Procedure provides as follows:

The medical examiner shall keep full and complete records properly indexed, giving the name if known of every person whose death is investigated, the place where the body was found, the date, the cause and manner of death, and shall issue a death certificate. The full report and detailed findings of the autopsy, if any, shall be a part of the record. Copies of all records shall promptly be delivered to the proper district, county, or criminal district attorney in any case where further investigation is advisable. The records are subject to required public disclosure in accordance with Chapter 552, Government Code, except that a photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with Chapter 552, Government Code, but is subject to disclosure:

(1) under a subpoena or authority of other law; or

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<sup>3</sup>As a general rule, statutes outside chapter 552 of the Government Code that expressly make certain information public prevail over exceptions to required public disclosure under chapter 552. *See Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989)*.

(2) if the photograph or x-ray is of the body of a person who died while in the custody of law enforcement.

Code Crim. Proc. art. 49.25, § 11. Because the exceptions to withholding autopsy photographs or x-rays do not apply in this instance, we agree that the district attorney must withhold photographs or x-rays of a body taken during an autopsy. Thus, you must withhold the autopsy photographs under section 552.101 in conjunction with article 49.25, section 11 of the Code of Criminal Procedure.

However, you advise that it is unclear whether all photographs were taken during the autopsy or whether some were taken at the crime scene. Section 11 of article 49.25 does not apply to crime scene photographs; therefore the district attorney may not withhold crime scene photographs under section 11. Nevertheless, you argue that any such crime scene photographs should also be withheld under section 552.101, which encompasses information protected by the common-law right to privacy. Information must be withheld from disclosure under section 552.101 in conjunction with the common-law right to privacy when (1) the information is highly intimate or embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities and (2) there is no legitimate public interest in its disclosure. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Again, however, we note that the privacy rights of an individual lapse upon death. Thus, we conclude that the district attorney may not withhold any crime scene photographs from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy. *See generally* Attorney General Opinion H-917 at 3-4 (1976); *see also* Open Records Decision No. 272 at 1 (1981).

However, some other private information must be withheld under section 552.101. This office has held that personal financial information not related to a financial transaction between an individual and a governmental body is protected by common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). Therefore, we have marked some personal financial information that relates to an individual other than the one who is the subject of the instant request, that you must withhold under section 552.101.

In addition, a W-4 form is confidential under section 6103 of title 26 of the United States Code. Section 6103(a) makes federal tax return information confidential. The term "return information" includes "the nature, source, or amount of income" of a taxpayer. *See* 26 U.S.C. § 6103(b)(2). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *dismissed in part, aff'd in part, vacated in part, and remanded*, 993 F.2d 1111 (4<sup>th</sup> Cir. 1993). The district attorney must therefore withhold the marked W-4 form.

You claim that some additional submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. The MPA provides that "a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter." Occ. Code § 159.002(b). We agree that some of the submitted information constitutes confidential medical records that may only be disclosed in accordance with the access provisions of the MPA. *See* Occ. Code § 159.005(a)(5), (b); *see also* Open Records Decision Nos. 598 (1991), 546 (1990). Therefore, absent the applicability of an MPA access provision, you must withhold the medical records that we have marked from disclosure pursuant to section 552.101 of the Government Code in conjunction with the MPA.

Access to the EMS records at issue is governed by the provisions of section 773.091 of the Health and Safety Code. Open Records Decision No. 598 (1991). Section 773.091 of the Health and Safety Code, the Emergency Medical Services Act, provides:

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

....

(g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services. . . .

Section 773.091(b) thus protects from disclosure the submitted EMS records. *See* Open Records Decision No. 598 (1991). However, information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient is not confidential. Health & Safety Code § 773.091(g).

It does not appear that any of the exceptions to confidentiality set forth in section 773.092 of the Health and Safety Code apply in this instance. Accordingly, the district attorney must withhold the submitted EMS records under section 552.101 of the Government Code, except for information required to be released under section 773.091(g).

We note that a social security number may be excepted from required public disclosure under section 552.101 of the Government Code in conjunction with the 1990 amendments to the

federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). Therefore, prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the district attorney pursuant to any provision of law enacted on or after October 1, 1990.

In addition, section 552.130 excepts from public disclosure information relating to a driver's license or motor vehicle title or registration issued by an agency of this state. Gov't Code § 552.130(a). This office has concluded that section 552.130 does not encompass motor vehicle information that pertains exclusively to a deceased individual. *See* ORD 272 at 1.<sup>4</sup> However, the submitted records contain other motor vehicle record information, including Texas driver's license numbers, license plate numbers, vehicle identification numbers, and copies of Texas driver's licenses that the district attorney must withhold in accordance with section 552.130.

The submitted documents also contain information that is protected by section 552.136. The Seventy-seventh Legislature recently added section 552.136 to the Public Information Act, which makes bank account numbers confidential. Senate Bill 694 was passed on May 14, 2001, and became effective when it was signed by the Governor on May 26, 2001. It provides, in relevant part, as follows:

**Sec. 552.136. CONFIDENTIALITY OF CREDIT CARD, DEBIT CARD, CHARGE CARD, AND ACCESS DEVICE NUMBERS.**

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

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<sup>4</sup>The same bill that added section 552.130 to chapter 552 of the Government Code also enacted chapter 730 of the Transportation Code. *See* Act of May 29, 1997, 75<sup>th</sup> Leg., R.S., ch. 1187, § 1, 1997 Tex. Gen. Laws 4575. The purpose of that legislation was to bring Texas into compliance with the federal Driver's Privacy Protection Act and to protect individual privacy interests by restricting the use of driver's license and motor vehicle information. *See* Senate Comm. on State Affairs, Bill Analysis, S.B. 1069, 75<sup>th</sup> Leg., R.S. (1997); *see also* Transp. Code § 730.002 (purpose of Motor Vehicle Records Disclosure Act is to protect individual's personal privacy by prohibiting disclosure and use of personal information in motor vehicle records).

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Thus, pursuant to section 552.136, you must withhold the bank account numbers of all individuals other than the deceased.

In summary, you may withhold the information related to the investigations of the Youngblood and Wilson homicides under section 552.108(a)(2) with the exception of basic information under section 552.108(c) and the autopsy report. You must withhold the grand jury information you have submitted. You must withhold the criminal history information, personal financial information, W-4 form, and EMS records we have marked, and autopsy photographs under section 552.101. You must withhold any social security number information under section 552.101 if it was obtained or is maintained pursuant to any provision of law enacted on or after October 1, 1990. In addition, you must withhold under section 552.130 the Texas motor vehicle record information of all individuals not deceased, and must withhold under section 552.136 the bank account numbers of all individuals not deceased. We have marked the information that you may release only in accordance with the MPA. You must release the remaining requested information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report



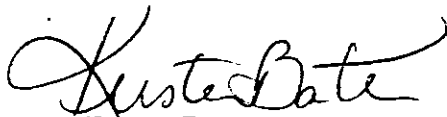
that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Kristen Bates", with a stylized, flowing script.

Kristen Bates  
Assistant Attorney General  
Open Records Division

KAB/seg

Ref: ID# 158735

Enc. Submitted documents

c: Ms. Danalynn Recer  
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412 Main Street  
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(w/o enclosures)